FIL

Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

UNITED STATES OF AMERICA

vs.

NICHOLAS A. STIRONE,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal from a final order and judgment of the United States District Court for the Western District of Pennsylvania for want of jurisdiction.

OPINIONS BELOW

The Opinion of the Court of Appeals is not officially reported. It appears hereinafter as Appendix A. The opinions of the District Court, not yet officially reported, appear as Appendix D and E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 22 (2). The final order and

judgment of the Court of Appeals dismissing the appeal in United States v. Stirone was rendered on January 23, 1961.

QUESTION PRESENTED

Was the denial of petitioner's Motion for Discharge of Defendant and Release of his Bail before trial in which he claims his constitutional rights had been violated an appealable decision under 28 U. S. C. § 1291?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

1. United States Constitution, Amendment V: * * * that "no person shall be held to answer for a capital, or otherwise infamous crime, unless, on a presentment or indictment of a grand jury * * *"

2. 28 U. S. C. § 1291 provides: "§ 1291. FINAL DECISIONS OF DISTRICTS COURTS. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The petitioner was prosecuted for unlawful violation of the Hobbs Act.[1] The United States District Court for the Western District of Pennsylvania, *U. S. v. Nicholas A. Stirone*, 168 F. Supp. 490, entered judgment of conviction and defendant appealed. The United States Court of Appeals for the Third Circuit, *U. S. v. Nicholas A. Stirone*, 262 F. 2d 571, affirmed, and the United States Supreme Court granted writ of certiorari on April 27, 1959, *Nicholas A. Stirone, Petitioner, v. U. S.*, 359 U. S. 978, 79 S. Ct. 897. On January 11, 1960, the Supreme Court of the United States reversed the decision of the Circuit Court, *Nicholas A. Stirone, Petitioner, v. U. S.*, 361 U. S. 212, 80 S. Ct. 270. The United States Supreme Court remanded the case to

[1] 18 U.S.C.A. § 1951.

the United States District Court with directions for proceedings in conformity with the opinion of this Court. (Appendix C, *infra*, p. 12.)

Subsequent to the decision of your Honorable Court reversing the conviction, petitioner on October 10, 1960 filed in the District Court a motion for Discharge of Defendant and Release of Bail. (Appendix A, *infra*, p. 10.) The motion reads as follows:

> "1. The Indictment of the Grand Jury having been amended, and there being no new indictment found by a Grand Jury, the present indictment is a nullity, and the Court therefore is without jurisdiction over the person of this defendant, and he is entitled to his discharge, there being no legal indictment of a Grand Jury before the Court. There is no legal indictment as required by the Fifth Amendment which would give the Court jurisdiction over this defendant."

On denial of this motion by the District Court (Appendix E, *infra*, p. 16)[2] petitioner appealed to the Circuit Court of Appeals. The Government filed a motion in the Court of Appeals to docket and dismiss the appeal. On January 23, 1961 the motion to docket and dismiss the appeal was argued before the Circuit Court of Appeals. On the same day the Circuit Court entered its judgment and ordered that the appeal be docketed and dismissed for want of jurisdiction. (Appendix B, *infra*, p. 11.)

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[2]The District Court in its Order of December 29, 1960 denying petitioner's Motion for Discharge of Defendant and Release of Bail stated that the grounds for relief had previously been considered by the Court in its Memorandum Opinion dated September 29, 1960. (Appendix D, *infra*, p. 13.)

REASONS FOR GRANTING THE WRIT

1. The Issue Here is One of First Impression. It is Important That Your Honorable Court Resolve the Issue Whether a Defendant Has the Right to Appeal an Order of a District Court Under 28 U.S.C. 1291 Denying Him His Constitutional Rights to be Tried under a Valid Indictment of a Grand Jury.

2. The Decision of the Court Below Directly Conflicts With Its Prior Decision in the Case of *U. S. v. Sineiro*, 190 F. 2d 397.

ARGUMENT

In construing 28 U.S.C.A. 1291, which establishes appellate jurisdiction of "final decisions," your Honorable Court in the case of *Stack v. Boyle*, 324 U. S. 1, 72 S. Ct. 1, said:

> "* * * it is a final decision that Congress has made reviewable. 28 U.S.C. § 1291, 28 U.S.C.A. § 1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. * * *"

Each case where finality is an issue must be determined by the particular circumstances. See *United States v. Wallace & Tiernan Co.*, 336 U. S. 793, 802 (1949) where this Court said:

> "* * * whether a motion and order 'is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances.* * *' "

The petitioner's motion for discharge is not to be construed as a Motion to Dismiss the Indictment as the

government contends.[1] If so, it would clearly be within the purview of 28 U.S.C. § 1291 and must fail.

We submit that in the instant case, the issue raised by the motion was whether the amended indictment was null and void which deprived the District Court of jurisdiction without a new indictment by a Grand Jury. *Ex Parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849.

These matters are entirely independent of the issues to be tried under a Hobbs Act case. 18 U. S. C. A. § 1951 (a).

There is no attempt to have the Appellate Court hear again the Stirone case piecemeal. The occasion for the motion did not arise until after the U. S. Supreme Court had decided that the indictment had been amended by the trial judge. *Nicholas A. Stirone, Petitioner, vs.* United States, 361 U. S. 212, 80 S. Ct. 270. The motion was therefore extraordinary and was not a usual motion made in regular course before trial.

We raise an important and constitutional question by the appeal, and we rely upon the following cited cases for the proposition that the District Court Order was appealable.

In *Cohen v. Beneficial Loan Corporation*, 337 U. S. 541, 69 S. Ct. 122, this Court affirmed the decision of the lower Court upholding the appealability of a District Court Order and laid down the law as follows: (p. 1251 of 69 S. Ct.)

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate

[1]Government's Brief, Page 3, in support of its Motion to Docket and Dismiss the Brief filed in the Court below, states the question to be Argued "Is the refusal of a motion to dismiss an indictment a final order which may be appealed?